

Supplemental Letter of Findings: 07-0616
Gross Retail Tax
For the Years 2004, 2005, and 2006

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ISSUE

I. Taxpayer Provided Equipment – Gross Retail Tax.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-7(a); IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-15](#); [45 IAC 2.2-5-15\(a\)](#); [45 IAC 2.2-5-15\(b\)\(2\)](#); Black's Law Dictionary (8th ed. 2004).

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells popcorn poppers, hot dog roasters, cotton candy machines, food supplies, and other food equipment. The Department of Revenue (Department) conducted an audit review of taxpayer's sales tax records and returns finding that taxpayer had properly collected sales tax from its customers and remitted the tax to the state. However, the audit found that taxpayer had purchased items of equipment for which it owed use tax and issued an audit report to that effect. Taxpayer disagreed with the proposed use tax assessments and submitted a protest. The matter was assigned to a hearing officer, an administrative hearing was scheduled, but taxpayer failed to participate. On the assumption that taxpayer wished to have the disputed assessments resolved based upon the information contained within the file and on the information accompanying the initial protest, a Letter of Findings was prepared and issued. After receiving the Letter of Findings, taxpayer's representative objected on the grounds that he had insufficient notice of the hearing and that he was denied the opportunity to present relevant evidence. Another hearing was scheduled, taxpayer's representative took part in this second hearing, and subsequently submitted additional information. This Supplemental Letter of Findings results.

I. Taxpayer Provided Equipment – Gross Retail Tax.

DISCUSSION

IC § 6-8.1-5-1(b) states that "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." The initial audit determination of taxpayer's liabilities arrives with a presumption of correctness. IC § 6-8.1-5-1(c) states that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In Indiana, a sales tax is imposed on retail transactions and a complementary use tax is imposed on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

In determining whether tangible personal property is subject to use tax, IC § 6-2.5-3-7(a) provides that "A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption."

The audit found that "taxpayer is providing equipment to the customer at no charge on the condition that all of the products and supplies needed to use that particular machine be purchased from the taxpayer." The audit report stated that these items of equipment are "logged into inventory but the taxpayer still maintains ownership and is responsible for the repairs of the equipment." The audit found that this equipment was "being used and stored in the State and [was] subject to use tax." As authority, the audit report cited to [45 IAC 2.2-3-4](#) which states that "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana gross retail tax has been collected at the point of purchase."

The issue is whether taxpayer has met its burden of proof under IC § 6-8.1-5-1(c) sufficient to rebut the presumption set out in IC § 6-2.5-3-7(a) that the equipment, purportedly loaned to its customers, was subject to use tax. Taxpayer's argument is based on IC § 6-2.5-5-8 which states that, "Transactions involving tangible personal property... are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property." Therefore, if taxpayer purchased the equipment for the purpose of renting or leasing to its customers, the equipment was not subject to sales or use tax. The exemption sought is reiterated at [45 IAC 2.2-5-15](#), which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
- (3) The property is resold, rented or leased in the same form in which it was purchased.

The original Letter of Findings (LOF) found that taxpayer's arguments were ambiguous and unsupported by the available evidence. The LOF noted that taxpayer was "unable to produce copies of lease agreements to document the terms of these agreements it had with its customers...." The rehearing was granted based upon the taxpayer's assurance that "we do have significant facts and information that will clearly show the taxpayer does not use these pieces of equipment in his business and should not be assessed use tax on these items." In addition, taxpayer asserted that it "can easily show these items are inventory for resale and his customers clearly use them in the ordinary course of there (sic) business which is the cleat (sic) definition of inventory." In effect, taxpayer makes two arguments; taxpayer argues that it is a wholesaler selling equipment to taxpayer's customers and/or that it rents the equipment to its customers. Neither contention is borne out by the evidence. Despite assurances that it would do so, taxpayer has failed to submit copies of the lease agreements it maintains that it enters into with its customers. If – as taxpayer maintains – it leases the equipment to its customers, there is nothing which establishes the term of the lease, the conditions under which the equipment is leased, or the circumstances establishing when or if the equipment is ever to be returned to the taxpayer. Instead, taxpayer has supplied multiple Quickbook entries which indicate that taxpayer's customers pay a single "Rental use fee" or a "Placement fee" at a cost of ranging between "0" and \$600 with the apparent majority of customers being charged either "0" or \$100. Whether the cost charged is "0" \$100, \$200, or \$300, the Department is unable to agree that taxpayer has established this it is in the business of renting this equipment to its customers "in the regular course of the purchaser's business." [45 IAC 2.2-5-15](#)(a). Taxpayer's argument fails because there is no evidence of any agreement specifying the terms of the parties' agreement.

A lease agreement is necessarily evidenced by "A contract [in] which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." Black's Law Dictionary 907 (8th ed. 2004). Without more, simply labeling an exchange of property and a fee as a "lease" does not make it so.

Taxpayer purchases food preparation equipment which it allows customers to use with the understanding that the customer will purchase the related supplies from taxpayer. Taxpayer charges these customers a one-time "Rental use fee" or a "Placement fee" at a cost of ranging between "0" and \$600. However that cost is labeled, there is no evidence of a lease agreement between taxpayer and its customers. Taxpayer has failed to meet its statutory burden necessary to establish that taxpayer "is occupationally engaged in reselling, renting or leasing... property in the regular course of his business." [45 IAC 2.2-5-15](#)(b)(2).

Taxpayer has provided absolutely nothing in support of its alternate contention that it is acting as a wholesaler and that the "items are inventory for resale."

FINDING

Taxpayer's protest is respectfully denied.

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